No. 90-149 (6)

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MICHIGAN, PETITIONER

v.

NOLAN K. LUCAS

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Michigan's rape-shield statute requires a defendant who intends to offer evidence of the victim's past sexual conduct to give advance notice and make an offer of proof regarding that evidence. The question presented is whether it violates the Confrontation Clause to bar cross-examination of the victim about her prior sexual conduct with the defendant as a sanction for the defendant's failure to comply with the statute's pretrial notice requirement.

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INTEREST OF THE UNITED STATES

The Federal Rules of Evidence contain a rape-shield provision generally similar to the provision at issue in this case. The federal rule, Fed. R. Evid. 412, requires a defendant who intends to offer evidence of specific instances of the victim's past sexual conduct to give advance notice of that intention 15 days before trial. Fed. R. Evid. 412(c)(1). Following the filing of the notice and an accompanying offer of proof, the court must conduct an in-chambers hearing to determine whether the evidence is admissible. Fed. R. Evid. 412(c)(2). Because of the similarity of the federal notice requirement to the requirement at issue in this case, the Court's analysis

here is likely to affect federal sexual abuse cases involving Rule 412.

STATEMENT

1. a. Michigan's rape-shield statute, Mich. Comp. Laws Ann. § 750.520j (West Supp. 1990), requires a defendant who proposes to offer evidence of the victim's past sexual conduct to file a written motion and offer of proof "within 10 days after the arraignment on the information." The trial court may then hold an in camera hearing to determine whether the evidence is admissible. If new information is discovered during the trial that renders the sexual-conduct evidence admissible, an in camera hearing may be held at that time.[1]

[1] The statute, Mich. Comp. Laws Ann. § 750.520j (West Supp. 1990), provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1) (a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1) (a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

b. Respondent was charged with two counts of criminal sexual conduct, in violation of Mich. Comp. Laws Ann. § 750.520d (West Supp. 1990), and was tried before a judge of the Circuit Court of Wayne County, Michigan. On the first day of trial, respondent's counsel requested that the court allow, "throughout this trial, testimony concerning prior sexual intercourse between the defendant and the complainant, even though I know it goes against the Statute." Tr. 3. Counsel explained that she had not been appointed until after the time for filing a motion under the rape-shield statute had expired. *Ibid.* The prosecutor objected, citing the rape-shield statute and explaining that its procedures require that "a motion has to be filed * * * within 10 days of the arraignment on the information." Tr. 4. The prosecutor also noted that respondent had been represented by different counsel at the preliminary examination and the arraignment on the information, but that respondent's present counsel had been appointed well before the trial. *Ibid.*

Respondent's counsel acknowledged the untimeliness of her motion, but stated that respondent "has rights too, and that is the right to defend himself as vigorously as he possibly can. * * * Much of [respondent's] defense * * * centers around the sexual intercourse that he did have in previous months prior to the day of the incident." Tr. 5. When the trial judge asked respondent's counsel why the motion was not made earlier, she replied that "I was not aware that I could have made it because [respondent] had a different attorney. In fact, I was appointed to this

case one week prior to trial initially when he had his first attorney." *Ibid.*[2]

After reviewing the Michigan rape-shield statute, the court denied respondent's motion. The court explained that "[n]one of the requirements set forth in [the statute] have been complied with." Tr. 6. The court noted that not only had respondent failed to give timely notice, but "the Court should have [had] an in camera hearing on the evidence, which has not been done." *Ibid.* Accordingly, the court ruled that unless new information was discovered during the trial, evidence covered by the rape-shield statute would not be admitted. *Ibid.*

2. At trial, the alleged victim, Wanda Brown, gave the following account: Prior to August 31, 1984, respondent had been involved in a boyfriend-girlfriend relationship with Brown for approximately six to seven months. In mid-August, Brown and respondent became estranged. Brown stopped dating respondent because of concerns about aspects of his personality and behavior. Pet. App. 2a; Tr. 66, 99.

On the evening of August 31, at about 10:30 p.m., Brown was walking from her house to a nearby gas station to purchase cigarettes. On the way, she passed respondent's house. Respondent approached her, brandished a pocket knife, grabbed her by the arm, and forced her into his house. Inside the house, respondent beat her, held his knife to her throat, and made her

[2] Although the transcript is confused on the issue of when respondent's trial counsel was appointed, respondent's brief in opposition in this Court states (at 3) that respondent was initially represented by retained counsel, who withdrew on November 8, 1984, 14 days after the arraignment on the information. The trial judge then appointed counsel for respondent on February 8, 1985—more than three months before the beginning of trial on May 14, 1985.

undress. Respondent then forced Brown to engage in several nonconsensual sexual acts. Brown was locked into respondent's house with him until approximately 10:00 p.m. on September 1, 1984. She arrived home with a swollen, bruised, and almost-closed right eye. Pet. App. 2a; Tr. 13-18, 22-23, 26-34, 36-39, 47-49.[3]

Respondent, the only witness for the defense, painted a different picture of the events of August 31, 1984. According to respondent, he and Brown had been involved in a close relationship since April and had seriously contemplated marriage. Respondent acknowledged that their relationship was "shaky" as of August 31, and that he and Brown had been estranged for about two weeks as of that date.[4] He testified, however, that Brown had engaged in voluntary, con-

[3] In cross-examining Brown, respondent's counsel asked whether Brown frequented any particular room in respondent's house during the time they dated. On the prosecutor's objection, the trial judge reiterated that he did not want questioning that "will by inference indicate prior sexual contact." Tr. 63. Counsel respected that limitation and did not attempt to elicit testimony about specific instances of sexual conduct involving Brown and respondent. Evidence that Brown and respondent had previously had a sexual relationship was elicited during respondent's testimony, however. See note 4, *infra*.

[4] Respondent stated that his estrangement from Brown stemmed in part from his belief that he had contracted gonorrhea from her. Tr. 182. The prosecutor objected to this testimony, citing the court's "pretrial ruling that none of this area could be touched on." Tr. 183. The court, however, permitted respondent to attempt to lay a foundation for that line of questioning by establishing that respondent had been diagnosed as having gonorrhea. Tr. 185. The questioning was inconclusive, Tr. 185-193, and respondent did not pursue it. Respondent later testified that he had been under the impression that Brown was carrying his child, but that Brown had told him otherwise on August 31. Tr. 205-206.

sensual sex with him several times during the 24 hours that Brown was in his house, and that he had not applied force to compel Brown to have sex with him. Pet. App. 2a; Tr. 164, 167-168, 180-181.[5]

The trial judge credited Brown's testimony, Tr. 263-264, and found respondent guilty on two counts of criminal sexual conduct. Although reducing the charge from a first to a third degree offense, Tr. 266, the judge concluded that respondent had used force and coercion to compel Brown to engage in sexual acts with him. Tr. 264, 266.

3. The Michigan Court of Appeals reversed, finding that the exclusion of evidence about respondent's prior sexual relationship with Brown violated his constitutional rights. In so holding, the court focused its attention exclusively on the validity of the pretrial notice-and-hearing requirements of the rape-shield statute. In *People* v. *Williams*, 95 Mich. App. 1, 289 N.W.2d 863 (1980), rev'd on other grounds, 416 Mich. 25, 330 N.W.2d 823 (1982), the court had found those requirements "unconstitutional when applied to preclude evidence of specific instances of sexual conduct between a complainant and a defendant." Pet. App. 3a. The court reaffirmed that ruling in this case. *Id.* at 6a.

The court explained that the purpose of the notice requirement is to allow the prosecutor time before trial to investigate the alleged prior sexual conduct by the victim. That rationale, the court indicated, "loses its logical underpinnings" as applied to sexual conduct between the defendant and the complainant; because the relationship is "personal between the par-

[5] Respondent acknowledged slapping Brown on one occasion, but he testified that that occurred after Brown had taunted him by stating that she was pregnant by one "Ricky," and had slapped him first. Tr. 206.

ties," additional witnesses and preparation time would not be required. Pet. App. 3a, 4a. Moreover, the court added, an in camera hearing with respect to such evidence was neither necessary nor appropriate because it would "necessarily focus on a complainant's word against the word of a []defendant," *ibid.*; the court had found in *Williams* that such credibility issues are properly left to the ultimate factfinder, rather than determined by the judge prior to trial as an issue of admissibility. 95 Mich. App. at 9-10, 289 N.W.2d at 866. After concluding that the evidence had improperly been excluded for violation of the notice requirement, the court found that the evidence satisfied traditional standards for admissibility. Pet. App. 7a. Accordingly, the court set aside respondent's conviction. *Ibid.*

4. On the State's application for leave to appeal, the Michigan Supreme Court remanded the case for the court of appeals to determine whether the trial court's exclusion of the evidence was "harmless beyond a reasonable doubt." Pet. App. 8a-9a. On remand, the court of appeals found that, because the evidence of previous sexual relations went to credibility, and because "[v]irtually all of the evidence in this case consisted of complainant's word against the word of [respondent]," exclusion of the evidence was not harmless beyond a reasonable doubt. *Id.* at 11a-12a. The Michigan Supreme Court denied the State's application for leave to appeal. Pet. App. 13a.

SUMMARY OF ARGUMENT

Congress and the legislatures of many States, including Michigan, have enacted rape-shield statutes to prevent rape victims from being further victimized in court through harassing and largely irrelevant cross-examination regarding their prior sexual

behavior. A common feature of such statutes is the establishment of procedures for litigating evidentiary issues before trial in a manner that protects the victims' privacy. The Michigan Court of Appeals incorrectly held that, when the victim's prior sexual conduct involves an alleged relationship with the defendant, the Sixth Amendment forbids a State from imposing a pretrial notice requirement as a condition of introducing such evidence.

The Confrontation Clause does not give criminal defendants an unrestricted right of cross-examination. Trial courts "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on * * * cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). More generally, procedural and evidentiary restrictions on the defendant's right to present evidence are valid unless "arbitrary or disproportionate to the purposes they are designed to serve." *Rock* v. *Arkansas*, 483 U.S. 44, 55-56 (1987). That consideration applies with special force to advance notice rules that do not absolutely restrict a defendant's right to offer evidence, but merely condition that right on compliance with established procedures.

The Michigan statute at issue here, like its state counterparts and Fed. R. Evid. 412, represents a valid legislative determination that rape victims, who already have undergone severe trauma, deserve heightened protection against being subjected to unnecessary further trauma in the courtroom. There is no merit to the court of appeals' holding that a pretrial notice requirement serves "no useful purpose" where the alleged prior sexual relationship involves

the defendant and the victim. In some cases, a court will be able to determine in advance of trial that evidence of the defendant's prior sexual relationship with the victim is inadmissible, thereby sparing the victim the humiliation of a public, midtrial hearing on the admissibility of that evidence. And even if the evidence of a prior sexual relationship between the defendant and the complainant is not excluded altogether, the notice-and-hearing procedure allows the trial court to fashion appropriate limits on the scope of the inquiry permitted.

It follows from the constitutional validity of an advance-notice requirement that there will be cases where preclusion of evidence is an appropriate sanction for a defendant's failure to comply with the statute. See *Taylor* v. *Illinois*, 484 U.S. 400, 410-416 (1988). But because the denial of such cross-examination may, in a particular case, seriously impede the defendant in presenting his defense, the Sixth Amendment requires a careful weighing of interests before a trial court imposes that sanction. The Michigan reviewing courts did not address the issue whether the trial court properly exercised its discretion in limiting respondent's proposed cross-examination in this case. Accordingly, the case should be remanded for the state courts to review that issue in the first instance.

ARGUMENT

THE CONFRONTATION CLAUSE IS NOT VIOLATED BY A REASONABLE REQUIREMENT THAT A DEFENDANT GIVE PRETRIAL NOTICE OF HIS INTENTION TO CROSS-EXAMINE AN ALLEGED RAPE VICTIM ABOUT HER PRIOR SEXUAL CONDUCT WITH THE DEFENDANT

A. The Sixth Amendment Does Not Prohibit Procedural Rules That Reasonably Promote Legitimate Interests In The Criminal Process

1. The central mission of the Sixth Amendment is to guarantee that the defendant in a criminal case has a fair opportunity to present his version of the facts so that the factfinder "may decide where the truth lies." *Washington* v. *Texas*, 388 U.S. 14, 19 (1967). By protecting the defendant's right to confront the witnesses against him, to present the testimony of his own witnesses, and to enjoy the assistance of counsel, the Sixth Amendment spells out "the basic elements of a fair trial." *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984); *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986).

The defendant's opportunity to present his version of the facts, however, is necessarily qualified by other legitimate interests in the criminal trial process. The Court has recognized that a defendant "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988); *Washington* v. *Texas*, 388 U.S. at 23 n.21. Rather, evidence may be excluded "through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted." *Crane* v. *Kentucky*, 476 U.S. 683,

690 (1986). Procedural rules governing the mode and presentation of proof, the regulation of objections, and the admissibility of evidence are indispensable to the orderly conduct of a criminal trial. Without an established set of rules, participants in a criminal trial would be unable to engage in rudimentary planning and meaningful presentation of their cases, courts would be unable to administer trials fairly and even-handedly, and "[t]he trial process would be a shambles." *Taylor*, 484 U.S. at 411.

The Confrontation Clause creates no exception to these principles.[6] Although the right to confront and to cross-examine witnesses plays a critical role in assuring the reliability of evidence adduced at a criminal trial, see *Maryland* v. *Craig*, 110 S. Ct. 3157, 3163 (1990), that right "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973). Because the Confrontation Clause must "be interpreted in the context of the necessities of trial and the adversary process," *Maryland* v. *Craig*, 110 S. Ct. at 3166, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on * * * cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986).

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[6] The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, *Pointer* v. *Texas*, 380 U.S. 400 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

2. Procedural requirements that restrict the defendant's opportunity to present evidence are constitutionally suspect only when they are arbitrary or disproportionate to the legitimate interests they are designed to serve. See *Rock* v. *Arkansas*, 483 U.S. 44, 55-56 (1987); cf. *Henry* v. *Mississippi*, 379 U.S. 443, 448-449 (1965). The Court has articulated this principle in a variety of contexts.[7] In *Chambers* v. *Mississippi*, *supra*, the defendant in a murder trial was prevented from introducing evidence of another person's confession to the crime because of a state "voucher" rule, which precluded the defendant from cross-examining the witness after he recanted his confession, and a state hearsay rule, which precluded the testimony of individuals who had heard the witness's out-of-court confessions. Noting that the State neither sought "to defend the [voucher] rule," nor "explain[ed] its underlying rationale," 410 U.S. at 297, the Court concluded that the voucher and hearsay rules in tandem denied the defendant an adequate opportunity to present his defense. The Court explained that procedural rules may "not be applied mechanistically to defeat the ends of justice." *Id.* at 302.

The Court employed a similar approach in construing the Compulsory Process Clause in *Washington* v. *Texas*, *supra*. There, a state rule prohibited persons charged as participants in the same crime from testifying, in certain circumstances, in behalf of other

[7] Although the rights provided by the Sixth Amendment offer distinct protections, the Court has attempted to formulate consistent standards in accommodating those rights within the context of the trial process, and in determining when limitations on those rights have become excessive and impermissible. See *Maryland* v. *Craig*, 110 S. Ct. at 3166; *Crane* v. *Kentucky*, 476 U.S. at 690.

participants. Condemning the rule as "arbitrarily" denying the defendant the opportunity to present relevant and material testimony, the Court concluded that the defendant's compulsory process rights were violated. 388 U.S. at 23.

More recently, in *Rock* v. *Arkansas*, *supra*, the Court distilled from its prior cases the formulation that "the right to present relevant testimony is not without limitation," but restrictions on that right "may not be arbitrary or disproportionate to the purposes they are designed to serve." 483 U.S. at 55-56. Applying that principle, the Court invalidated a blanket prohibition on testimony by a defendant as to facts he recalled after undergoing hypnosis, because the ban transgressed reasonable limits and constituted an "arbitrary restriction on the right to testify." *Id.* at 61.[8]

[8] The Court has expressed a similar view in finding, in particular cases, that the defendant's opportunity to mount a defense may be infringed by arbitrary trial rulings denying material cross-examination. See *Olden* v. *Kentucky*, 488 U.S. 227, 232 (1988) (per curiam) (trial court's restriction on cross-examination of an alleged rape victim about her relationship with another man based on "[s]peculation as to the effect of jurors' racial biases" was "beyond reason" when the relationship gave the victim a possible motive to fabricate a claim of rape); *Delaware* v. *Van Arsdall*, 475 U.S. at 679-681 (defendant's right violated when he was not permitted to establish that prosecution witness agreed to testify in exchange for having charges against him dropped; trial court had excluded the evidence as more prejudicial than probative). A confrontation violation may also occur where the State asserts a legitimate interest in preserving the confidentiality of certain information, but not a sufficient interest to outweigh the defendant's right to expose a witness's possible bias. *Davis* v. *Alaska*, 415 U.S. 308, 319 (1974) (finding invalid a restriction on cross-examination that would have exposed a witness's juvenile record, which could be relevant to the defendant's claim of bias).

3. The principle that procedural rules designed to promote the integrity of the trial are valid, unless arbitrarily applied to thwart a fair presentation of the facts, applies with special force to rules that do not absolutely restrict a defendant's right to offer evidence, but merely condition the right on compliance with established procedures. This Court has held that rules requiring advance notice of anticipated trial evidence, such as alibi evidence, are not only constitutional, *Williams* v. *Florida*, 399 U.S. 78 (1970) (upholding reciprocal notice-of-alibi statute), but also "salutary development[s]" when applied in a fair and even-handed manner. *Wardius* v. *Oregon*, 412 U.S. 470, 474 (1973); see *Taylor* v. *Illinois*, 484 U.S. 400, 411 (1988) (rule "provid[ing] for pretrial discovery of an opponent's witnesses serve the same high purpose" as rules requiring advance notice of anticipated trial evidence). Such otherwise commendable rules become arbitrary and "fundamentally unfair" only when applied in a one-sided manner that undercuts the claimed government interest in ensuring trial fairness. See *Wardius*, 412 U.S. at 475 (invalidating non-reciprocal notice-of-alibi statute).

B. The Pretrial Notice Requirement of Michigan's Rape-Shield Statute Is A Reasonable Means Of Protecting Victim Privacy

Michigan's rape-shield statute does not require the exclusion of all testimony about an alleged rape victim's prior sexual conduct with the defendant. Indeed, the statute expressly authorizes trial judges to admit such evidence. What the statute does require is that the defendant follow specific procedures to obtain a ruling on the admissibility of the evidence. The defendant must file a written motion and offer of proof ten days after arraignment indicating his

intention to offer the sexual-conduct evidence. The trial judge then may order an in camera hearing to determine its admissibility. The evidence is admissible if and to the extent the judge determines that the evidence is material to a fact in issue, and that its probative value is not outweighed by its inflammatory or prejudicial effect. Mich. Comp. Laws Ann. § 750.520j(2) (West Supp. 1990).[9]

The Michigan Court of Appeals concluded that, as applied to sexual conduct between the defendant and the alleged victim, the notice-and-hearing requirement violates the Confrontation Clause. The court rested that holding solely on the reasoning articulated in *People* v. *Williams*, *supra*, which made two criticisms of the notice-and-hearing provision.[10] Declaring that the purpose of the notice provision is to bolster the prosecutor's ability to challenge sexual-conduct evidence at trial, *Williams* found that purpose irrelevant to prior sexual conduct between the defendant and the victim; unlike in the case of an alibi defense, the court thought that additional witnesses and investigation are not needed for the prosecutor to prepare his case. *Williams* further stated that an ad-

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[9] Although the statute puts substantive restrictions on the use of evidence of prior sexual conduct by barring the use of reputation evidence and by limiting the admissibility of specific instances of sexual conduct with persons other than the defendant, Mich. Comp. Laws Ann. § 750.520j(1) (West Supp. 1990), those restrictions were not applied to respondent. This case concerns the procedures mandated by the statute, not the statute's substantive policy judgments about categories of evidence that are inadmissible in sexual assault prosecutions.

[10] The *Williams* court acknowledged the validity of the notice requirement as applied to "sexual conduct between a complainant and third persons." 95 Mich. App. at 10, 289 N.W.2d at 866.

missibility determination regarding prior sexual conduct between the defendant and the victim "would necessarily break down into a consideration of the complainant's word against the defendant's word," thereby "usurp[ing]" the function of the trier of fact in determining the truth. 95 Mich. App. at 9-10, 289 N.W.2d at 866. In our view, the court of appeals' logic is untenable.[11]

The court's opinion that "no useful purpose" is served by the advance-notice requirement where the alleged conduct involves the defendant and complainant, Pet. App. 4a, is flawed on several levels. Even as to the purpose of the notice requirement identified by the court—to improve the prosecutor's ability to respond to the defendant's claims—the notice requirement would serve a valid function. Regardless of whether any eyewitness actually observed the parties engaged in the act of sex, persons who know the parties would certainly be able to offer circumstantial evidence (*e.g.*, admissions, observations of the parties' public conduct toward each other) tending to prove or disprove a prior sexual relationship and shedding light on the defendant's claims as to its duration and scope.

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[11] Respondent's contention (Br. in Opp. 9) that the decision below rests on an adequate and independent state ground is incorrect. *Williams* is the central Michigan precedent underpinning the judgment of the court of appeals, Pet. App. 3a-6a, and it rests squarely on federal law. See 95 Mich. App. at 5, 289 N.W.2d at 864. There is no "plain statement" in the decision below (or in *Williams*) that the principles requiring the reversal of respondent's conviction derive from state law. See *Michigan* v. *Long*, 463 U.S. 1032 (1983); *Illinois* v. *Rodriguez*, 110 S. Ct. 2793, 2798 (1990).

More fundamentally, the essential purpose of the notice-and-hearing procedure is to protect rape victims against unnecessary harassment and invasion of privacy. The Michigan statute, enacted in 1974, was the first rape-shield statute in the Nation; currently, rape-shield statutes have been enacted by nearly every State and by Congress. These statutes reflect a widely shared legislative judgment that the traditionally open-ended cross-examination of rape victims about their prior sexual history needlessly degrades victims, introduces irrelevant and prejudicial evidence, invites the jury to make moral judgments about the victims' character, and ultimately makes the trial experience so humiliating for victims as to discourage the reporting of rape.[12]

An integral part of the legislative protection of rape victims is the requirement of advance notice fol-

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[12] The background of Michigan's statute is traced in *People* v. *LaLone*, 432 Mich. 103, 123-125, 437 N.W.2d 611, 619-620 (1989). For discussions of the genesis of rape-shield statutes, their purposes, and their constitutional implications, see Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977); Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763 (1986); Nat'l Inst. of Law Enforcement and Crim. Justice, *Forcible Rape: An Analysis of Legal Issues* (1978); 23 C. Wright & K. Graham, *Federal Practice and Procedure* §§ 5381-5393 (1980 & Supp. 1990). The purposes of Fed. R. Evid. 412 are explicated in the debate accompanying the enactment of the rule. See 124 Cong. Rec. 36,256 (1978) (remarks of Sen. Biden); *id.* at 34,913 (remarks of Reps. Mann and Holtzman). Although Michigan's procedural requirements are not universally found in rape-shield statutes, "[m]ost rape victim shield laws require notice and a pretrial hearing before the defense may elicit sexual history testimony at trial." Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544, 577 (1980).

lowed by an in camera hearing on the admissibility of sexual-history evidence. Under both Michigan and federal law, advance notice is a necessary prerequisite to the in camera hearing at which admissibility is determined. Fed. R. Evid. 412(c)(2); Mich. Comp. Laws Ann. § 750.520j(2) (West Supp. 1990).

> The notice requirement prevents surprise to the prosecutor, the victim, and the court. The prosecutor can weigh the evidence and determine whether or not he will object to its admission, confer with the victim on its truthfulness, and organize legal argument to oppose it if that is the chosen strategy. The notice requirement also signals the court of the importance of the issue since some judges have tended to assume the relevancy of prior sexual conduct. * * *
>
> The main purpose of the private hearing is to protect the victim from the embarrassment which might occur if the details of her sexual history were revealed and debated in public. Quite possibly the evidence will be ruled inadmissible and the public may never know about these facts. * * * If the evidence is ruled to be admissible, then, of course, it would be presented in the public trial.

Nat'l Inst. of Law Enforcement and Crim. Justice, *Forcible Rape: An Analysis of Legal Issues* 26-27 (1978). See 124 Cong. Rec. 36,256 (1978) (remarks of Sen. Biden) (noting that Fed. R. Evid. 412 "establish[es] a special in camera procedure whereby the question of admissibility could be litigated without harm to the privacy rights of the victim or the constitutional rights of the defendant"); *id.* at 34,913 (remarks of Rep. Mann) (in camera hearing "protects the privacy of the rape victim in those instances when the court finds that evidence is inadmissible"); *People* v. *Hackett*, 421 Mich. 338, 350,

365 N.W.2d 120, 125 (1984) ("A hearing held outside the presence of the jury to determine admissibility promotes the state's interests in protecting the privacy rights of the alleged rape victim while at the same time safeguards the defendant's right to a fair trial."). Only if notice is given before trial can the special in camera hearing occur without delaying and interrupting the trial itself.[13]

While evidence of prior sexual conduct between the victim and the defendant may be relevant in many cases for the purpose of showing consent or bias,[14] the

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[13] Although the Michigan Court of Appeals did not describe the protection of victim privacy as one of the purposes of the notice-and-hearing procedure, the Michigan Supreme Court has made it clear that protection of privacy is one of that provision's purposes. *People* v. *Hackett, supra*; cf. *People* v. *Williams*, 416 Mich. at 47-48, 330 N.W.2d at 832 (Kavanagh, J., concurring) ("The notice requirement serves the purpose of ensuring that a victim's sexual past will not be exposed to public scrutiny without an *in camera* determination that such evidence is more probative than prejudicial."). Moreover, by making notice a necessary prelude to an in camera hearing, the statute on its face discloses a purpose to do more than just facilitate trial preparation. See also, Note, *Michigan's Criminal Sexual Assault Law*, 8 U. Mich. J.L. Ref. 217 (1974) (describing overall revision of Michigan's rape laws in 1974, including enactment of the shield provision, as part of a program to protect victim privacy).

Because the essential purpose of the notice-and-hearing procedure is to protect victim privacy, and not to facilitate pretrial discovery, the absence of "reciprocity" does not undermine the validity of the provision. See Berger, *supra*, at 80 (noting the difficulty of articulating a sense in which the provision could be reciprocal); 23 C. Wright & K. Graham, *supra*, § 5390, at 617 (same).

[14] See, *e.g.*, *People* v. *Perkins*, 424 Mich. 302, 379 N.W.2d 390 (1986) (sexual conduct between defendant and complainant one week before crime found admissible).

notice-and-hearing requirement serves important objectives even where the evidence is offered for those purposes. As an initial matter, evidence of a prior consensual sexual relationship between defendant and complainant is not invariably relevant even on the issues of consent and bias. *State* v. *Stellwagen*, 232 Kan. 744, 746-747, 659 P.2d 167, 169-170 (1983) (evidence lacked probative value because of remoteness in time). Michigan courts, like other courts, have recognized that because of lack of relevance, a defendant may not be entitled to introduce evidence of his own prior sexual relationship with the victim. See *People* v. *Williams*, 416 Mich. 25, 35-40, 330 N.W.2d 823, 826-829 (1982) (prior consensual sexual act between the defendant and the victim lacked probative value on whether the victim later consented to have group sex with the defendant and three others); *People* v. *Smith*, 128 Mich. App. 361, 363-364, 340 N.W.2d 855, 856-857 (1983) (prior sexual conduct between defendant and the victim was not material because the defendant did not raise a consent defense, but sought only to impeach the complainant's credibility); *State* v. *Hagen*, 391 N.W.2d 888, 892 (Minn. Ct. App. 1986) (defendant failed to raise an issue of consent or bias to which prior sexual acts with the victim were relevant).

Even when evidence of a prior sexual relationship between the defendant and complainant is admissible, the notice-and-hearing procedure allows the trial court to fashion appropriate limits on the scope of the inquiry allowed. For example, a trial court may decide to allow general inquiry into the fact of the prior sexual relationship between the defendant and the victim while nevertheless precluding evidence re-

garding certain specific sexual acts. See *People* v. *Zysk*, 149 Mich. App. 452, 458-460, 386 N.W.2d 213, 216-217 (1986) (limiting evidence of prior sexual relationship between the complainant and defendant to type of sexual conduct involved in the alleged assault). Rule 412(c)(3) of the Federal Rules of Evidence expressly provides for an order following the in camera hearing "specif[ying] evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined." The desirability of fine-tuning the permissible lines of inquiry to avoid unnecessary and prejudicial exposure of the victim's sexual past is not an arbitrary limitation on the defendant's rights, nor is it disproportionate to the State's interest in protecting the victim's privacy to the extent possible. Cf. *The Florida Star* v. *B.J.F.*, 109 S. Ct. 2603, 2611 (1989) (noting that the "privacy of victims of sexual offenses" is a "highly significant" interest); *Morris* v. *Slappy*, 461 U.S. 1, 13 (1983) ("[I]n the administration of criminal justice, courts may not ignore the concerns of victims.").

A pretrial hearing would not simply consist of a credibility contest between the defendant and the complainant, as the Michigan Court of Appeals suggested in *People* v. *Williams*. A court sitting in camera may interpret the evidence in the light most favorable to the defendant and still conclude that the sexual-history evidence is not relevant, or that its relevance is so marginal as to justify its exclusion because of its potential to distract the jury. Nothing in Michigan law requires that, in assessing the probative force of the evidence, the court must determine

as a factual matter whether prior consensual sexual acts actually occurred.

In sum, the advance notice requirement in Michigan's rape-shield statute is supported by nonarbitrary purposes, and its procedures are properly designed to serve those goals. It therefore provides a legitimate basis for the imposition of evidentiary sanctions in appropriate cases when the defendant fails to comply with the statute's requirements.

C. The Sanction Of Precluding A Line Of Cross-Examination May Legitimately Be Imposed In A Particular Case When A Defendant Has Failed To Comply With A Reasonable Notice Requirement

The trial court enforced Michigan's notice requirement by precluding inquiry into respondent's prior sexual relationship with the complainant. When a defendant fails to comply with a reasonable notice requirement and thereby deprives the trial court of an opportunity to conduct an in camera hearing in advance of the trial, preclusion of cross-examination of the complainant on her prior sexual conduct with the defendant may be warranted. But because the denial of such cross-examination may, in a particular case, seriously impede the defendant in presenting his defense, the Sixth Amendment requires careful inquiry before a trial court imposes that sanction.[15]

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[15] No confrontation issue is presented unless a reasonable factfinder "might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination," *Olden* v. *Kentucky*, 488 U.S. 227, 232 (1988) (per curiam) (brackets in original), quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986). Although that issue is governed by federal law, the findings of the Michigan Court of Appeals as to the character and relevance of the excluded evidence in this case, Pet. App. 5a-7a, 11a-12a, support the view that the *Olden-Van Arsdall* standard was met.

1. The sanction of preclusion is a necessary and appropriate response in certain cases to a defendant's failure to comply with rules of procedure. In *Taylor* v. *Illinois*, 484 U.S. 400 (1988), this Court rejected the proposition that the Compulsory Process Clause absolutely forbids the preclusion of defense-witness testimony as a sanction for the defendant's breach of a discovery rule. Although noting that "the fundamental character" of the defendant's right to present evidence must be respected, the Court stated that "[t]he integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance." *Id.* at 414-415. On the facts in *Taylor*, the Court upheld the trial court's preclusion order. *Id.* at 416-417. See also *United States* v. *Nobles*, 422 U.S. 225 (1975) (upholding preclusion of defense investigator's testimony when defendant refused to disclose investigator's underlying report).

Taylor did not "attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." 484 U.S. at 414. Although recognizing that "alternative sanctions are adequate and appropriate in most cases," *id.* at 413, the Court indicated that a trial judge may call upon the defendant to explain his omission, and, if the omission is revealed to be willful and part of an effort to achieve tactical advantage through surprise, preclusion is entirely appropriate. *Id.* at 414. Another relevant consideration

is the ease of compliance with a particular procedural rule. *Id.* at 415. Finally, the Court rejected the view that preclusion is inappropriate simply because the prosecution could be protected from prejudice through alternative procedures (such as a continuance or voir dire), *id.* at 416-417, or because the failure to comply might be attributable to the lawyer's misconduct rather than the client's. *Id.* at 417-418.

Although *Taylor* addressed the compatibility of a preclusion sanction with the Compulsory Process Clause, the same analysis should apply under the Confrontation Clause, which is similarly designed to protect the defendant's ability to elicit facts at trial that he believes helpful. Cf. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 593 (1978). *Taylor* observed that the compulsory process right differs from other Sixth Amendment rights in that "its availability is dependent entirely on the defendant's initiative," and requires "deliberate planning and affirmative conduct" to be effective. 484 U.S. at 410. But that distinction is inapplicable in a setting such as this, where the focus of the rule is on the introduction of evidence and it is immaterial whether the evidence is introduced on cross-examination of a government witness or on direct examination of a defense witness.[16]

[16] Respondent was precluded both from cross-examining Brown about his sexual relationship with her, and from offering his own testimony on that issue. Only the restriction on cross-examination is at issue here. Respondent did not claim an infringement of his constitutional right to testify in the lower courts, and that issue was not discussed by the Michigan Court of Appeals. See Resp. C.A. Br. 15-19; Pet. App. 1a-7a; see also Br. in Opp. 6-7. In reversing respondent's conviction the court relied (Pet. App. 3a-4a, 6a) almost entirely on *People* v. *Williams*, where the court had concluded that the notice provision in Michigan's rape-shield statute violated the "defendant's sixth amendment rights to confrontation and cross-examination." 95 Mich. App. at 5, 289 N.W.2d at 864. The only question presented by the petition is whether the Confrontation Clause was violated by the trial court's ruling in this case. Pet. i.

2. In this case, respondent's counsel waited until the eleventh hour—the first day of trial—before moving to introduce evidence of the complainant's prior sexual conduct with respondent. As counsel conceded, the request was substantially out of time under Michigan's rape-shield statute, and respondent offered no satisfactory explanation for the delay.[17] The trial judge was therefore justified in imposing some sanction, and it is unclear what effective sanction he could have devised short of preclusion. To grant a continuance and adjourn the trial to entertain respondent's motion not only would have caused administrative disruption, and inconvenience to all trial participants, but also would have rewarded respondent's procrasti-

[17] Respondent was arrested on September 5, 1984, Tr. 140, and was initially represented by retained counsel. After a preliminary examination on September 18, 1984, the arraignment on the information was held on October 25, 1984. A motion under Michigan's rape shield statute was due ten days later. Respondent's retained counsel did not file such a motion before withdrawing on November 8, 1984. The trial judge appointed new counsel for respondent on February 8, 1985. Although new counsel obviously could not have filed a motion to admit the sexual-conduct evidence within the ten-day period after arraignment, she offered no excuse for failing to move to admit the evidence until the beginning of trial on May 14, 1985.

nation with a trial delay that perhaps was sought for tactical effect. A defendant has no right to an automatic continuance in this setting. Cf. *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983) ("[B]road discretion must be granted trial judges on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel."); *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964) ("The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel.").

Moreover, the rape-shield statute creates a relatively simple procedure for counsel to follow. The requirement of notice and an offer of proof is a familiar one to trial lawyers, and it is triggered at a sufficiently advanced stage of the criminal process in Michigan to make it reasonable to require the defendant to state his intention to introduce sexual-history evidence. The defendant will already have had a preliminary hearing to determine probable cause, at which he may call and cross-examine witnesses, and will have entered his plea to the charges.[18] In a sexual-assault case, the

[18] Under Michigan procedure, a defendant is initially arraigned on the warrant of arrest, or on complaint, and advised of his constitutional rights. Mich. Ct. R. 6.104. Within the following 12 days a preliminary examination is scheduled. *Id.* at 6.104(E). The preliminary examination determines whether probable cause exists to bind the defendant over for trial, Mich. Ct. R. 6.110, and "[e]ach party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses." *Id.* at 6.110(C). Following the preliminary examination, the prosecution is initiated by the filing of an information or an indictment. Mich. Ct. R. 6.112. At that juncture, the arraignment on the information occurs, and the defendant enters his plea. Mich. Ct. R. 6.113.

defendant should know by that time whether his past sexual relations with the complainant will be a factor in his defense.

To be sure, there are considerations weighing against the sanction of preclusion in this case. The trial court did not explicitly address the question whether any lesser sanctions would be adequate, or whether it would have materially delayed the trial to conduct a hearing on respondent's motion. Sanctions should be graduated to the seriousness of the infraction, and the process of doing so involves the exercise of discretion. A universal application of the preclusion sanction when a notice is untimely would produce harsh results and, in extreme cases, could result in a Confrontation Clause violation.[19] In determining whether the Sixth Amendment is violated by a preclusion order in a particular case, a court must consider the degree, purpose, and effect of the violation. For example, preclusion would be constitutionally valid if the court determined that the violation was the product of willful misconduct, or purposely planned to obtain a tactical advantage. See *Taylor*, 484 U.S. at 416-417. Also relevant to the constitutional in-

[19] For example, if a notice were filed a few days late due to justifiable reasons beyond counsel's control in an isolated instance, that should normally not trigger preclusion. Likewise, if an indigent defendant had not received appointed counsel during the period when notice was due, enforcement of the statutory time limits by preclusion would normally be inappropriate in the absence of some apparent tactical purpose by the defense or serious prejudice to the prosecution.

quiry is the effect of the violation in disrupting the trial proceedings or prejudicing the opposing party. Courts should also consider whether admission of the evidence would compromise the policies of the particular procedural rule that was violated. And it is, of course, highly relevant to determine the effect that preclusion of the evidence would have on the defendant's ability to present the essence of his defense.

Unlike the record in *Taylor*, the record in this case does not at this point suggest that the violation of the notice requirement was the product of a tactical effort to gain an unfair advantage at trial, although that issue was not developed below. It is also unclear whether the prosecution was prejudiced by the late notification of respondent's intention to offer evidence of prior sexual conduct,[20] or whether the preclusion order denied the defendant an opportunity to present the substance of his defense. It does appear, however, that the purpose of the rape-shield statute to afford privacy to the victim can still be preserved by conducting a late, but in camera, hearing on the admissibility of the evidence.

In our view, the initial weighing of these factors, and the further development of the record if necessary, should be undertaken by the Michigan courts in the first instance. The reasons for respondent's delay are unclear, and the trial court did not make specific findings on any of the questions bearing on the constitutionality of the preclusion sanction in this case.

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[20] The prosecution was aware of prior sexual conduct between the parties, as the complaining witness had been cross-examined at the preliminary examination about her sexual relationship with respondent. Pr. Tr. 23.

Nor did the court of appeals consider the sanctions issue, apart from its view on the unconstitutionality of the notice requirement. If this Court were to uphold the constitutionality of the statutory notice requirement, it is not clear that the Michigan courts would uphold the sanction imposed in this case as a matter of state law.[21] If state law authorizes the sanction, the Michigan courts are better situated than is this Court to review and develop the factual issues that bear upon whether the trial court's exercise of discretion was compatible with the Confrontation Clause.

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[21] The rape-shield statute does not specifically mandate preclusion as a consequence of the failure to comply with the notice requirement. Although the Michigan Court of Appeals has upheld a trial court's exclusion of sexual-history evidence for failure to comply with the notice requirement alone, *People* v. *Smith*, 128 Mich. App. 361, 363, 340 N.W.2d 855, 856 (1983) (alternative holding), other Michigan decisions suggest that trial courts should exercise discretion as a matter of state law before applying notice provisions to exclude evidence, particularly when federal constitutional rights are at stake. See *People* v. *Merritt*, 396 Mich. 67, 82, 238 N.W.2d 31, 37-38 (1976) (discussing notice-of-alibi statute; "[t]he preclusion sanction is an extremely severe one, and the judge's discretion in exercising preclusion should be limited only to an egregious case."); *People* v. *Bennett*, 116 Mich. App. 700, 323 N.W.2d 520 (1982).

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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